PD-0395-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/11/2021 2:39 PM
Accepted 2/12/2021 8:27 AM
DEANA WILLIAMSON
CLERK

PD -0395-20

FILED
COURT OF CRIMINAL APPEALS
2/12/2021
DEANA WILLIAMSON, CLERK

In the Court of Criminal Appeals of Texas

NICOLE SELECTMAN,
Appellant-Petitioner
v.
THE STATE OF TEXAS,
Appellee-Respondent

On Petition for Discretionary Review
State's Brief on the Merits
Fourth Court of Appeals, San Antonio, Texas
No. 04-18-00553-CR

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TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

Now comes, Joe D. Gonzales, Criminal District Attorney of Bexar County, Texas, by and through his undersigned Assistant Criminal District Attorney, and files this Brief of the Merits on Petition for Discretionary Review.

STATEMENT OF THE CASE

The State accepts Appellant's Statement of the Case

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested by Appellant and denied.

STATEMENT OF FACTS

In the fall of 2014, Appellant, Nicole Selectman (hereinafter "Selectman") and Erica Rollins (hereinafter "Rollins") started living together after a long distance relationship. (3 RR 20-21). Selectman moved to San Antonio, Texas, and into Rollins's house. (3 RR 21). The relationship deteriorated, and by February of 2015 Rollins asked Selectman to move out. (3 RR 22). Rollins initially decided to let Selectman stay in the house until the end of the school year to allow Selectman's son to finish the school year. (3 RR 25). On the morning of April 2, 2015, Selectman confronted Rollins about something Selectman had seen on Facebook. (3 RR 24). Rollins asked Selectman to move out that morning. (3 RR 24-25). Selectman refused and Rollins went to the police station to ask about evicting Selectman. (3

RR 26). The process was complicated and Rollins returned home to work. (3 RR 27).

When Rollins returned home, Selectman was sitting in the upstairs living area on a sectional couch to retrieve her laptop to start work. (3 RR 33). Selectman again confronted Rollins, accused her of cheating and another argument broke out. (3 RR 33). Selectman pulled a gun from a couch cushion where she was sitting and shot Rollins in the arm. (3 RR 37). Rollins ran into the bathroom with her purse and cell phone. (3 RR 39). Selectman banged on the door. (3 RR 40). Rollins, fearful that Selectman would shoot through the door, opened the bathroom door. *Id*. Selectman demanded that Rollins unlock her phone and questioned Rollins about texts to her ex-wife. (3 RR 41).

Selectman eventually agreed to drive Rollins to the hospital. At the hospital, with Selectman in the room, Rollins first told nurses that an intruder shot her and Selectman "saved her." (3 RR 59, 78). After Selectman left the room, Rollins told nurses Selectman shot her. (3 RR 60). Hospital officials then called police. Rollins told police Selectman shot her. (3 RR 61).

On cross-examination, Selectman denied knowing a man named "Mac," denied Mac was in the house, and denied Mac was the person who shot her on April 2. (3 RR 77-79).

Defense witness, Tracy Thomas, Rollins told her in 2017 in the bathroom of a gay pride convention in Atlanta that she lied and now Selectman was in trouble. (4 RR 129). Specifically, Rollins said she had a boyfriend behind Selectman's back and one day Selectman came home from work while Rollins and the man were arguing about money. Selectman ran upstairs to defend Rollins, there was a scuffle, and a "gun went off in the middle of the struggle." (3 RR 129). Rollins did not tell Thomas whether Selectman or the man had the gun. (4 RR 129). Thomas did not name the man. A subsequent defense witness testified that in 2014 he met Rollins at a club with a man named "Mac" that she introduced as her fiancé. (4 RR 162). Another defense witness testified she met Rollins with a man named Mac that she introduced as her boyfriend. (4 RR 204).

STATE'S RESPONSE TO THE PETITION:

The petition should be dismissed as improvidently granted. Appellant relies on impeachment evidence to support her claim to a self-defense instruction. There was no substantive evidence supporting a jury instruction for self-defense or defense of third party.

SUMMARY OF THE ARGUMENT

The evidence Appellant relies on to support her argument that the trial court should have granted her request for a self-defense and defense of a third party instruction was admitted only for impeachment purposes.[1] It holds no probative value and should not be considered as substantive evidence. Given the lack of substantive evidence, the petition should be dismissed pursuant to Texas Rule of Appellate Procedure 69.3.

ARGUMENT

1. Relevant Law

Testimony admitted only for impeachment purposes is without probative value and cannot be considered substantive evidence. *Key v. State*, 492 S.W.2d 514, 516 (Tex. Crim. App. 1973); *Adams v. State*, 862 S.W.2d 139, 147 (Tex. App.—San Antonio 1993, pet. ref'd); *Bocanegra v. State*, 519 S.W.3d 190, 234 (Tex. App.—Fort Worth 2017, no pet.) (noting that impeachment evidence, whose only aim is to

[1] The State did not present this argument to the lower court; however, it is not precluded from presenting it to this Court. *State v. Esparza*, 413 S.W.3d 81, 85-86 (Tex. Crim. App. 2013).

attack credibility of witness but otherwise has no probative value, "it is not substantive evidence sufficient to prove a material fact in a case"); *see also Wilhoit v. State*, 638 S.W.2d 489, 499 (Tex. Crim. App. 1982) (holding that complainant's testimony as to whether defendant used a fake or real gun during aggravated sexual assault was impeachment evidence and did not entitle defendant to a jury charge with the lesser-included offense). Consequently, a jury may not use impeachment evidence substantively, but may consider the inconsistency as damaging to the witness's credibility. *Adams*, 862 S.W.2d. at 148.

2. *The evidence was admitted for impeachment purposes and cannot be considered substantive evidence*

On appeal, Selectman attempts to use impeachment evidence as substantive evidence of self-defense and defense of third person. After the State presented its case-in-chief in which Rollins testified that Selectman shot her during an argument, the defense presented testimony from Tracy Thomas. Thomas testified that Rollins told her in a bathroom in Atlanta in 2017 that Rollins had lied about Selectman shooting her because she was afraid of her ex-boyfriend. Specifically:

> THOMAS: She told me that Nicole was in trouble for something that she didn't do. Specifically, she said that Nicole - - she had a boyfriend behind Nicole's back.
>
> Nicole came home from work one day and her and her boyfriend were arguing about money and Nicole instantly came upstairs to her defense because she didn't know what was going on and I guess there was a gun involved and the gun went off in the middle of the struggle.

[portion omitted]

> THOMAS: Erica was stating that she was really afraid of the boyfriend. That he had threatened her. She had seen him on her street, on her block, and he's still harasses her now. Said that he threatened that if she didn't testify against Nicole that he would kill her because he couldn't tell the police -- she couldn't give the police his information and that's really all she said about him.

(4 RR 129-130).

Prior to Thomas's testimony, the State objected to hearsay. After a hearing outside the presence of the jury, the trial court overruled the objection and admitted the evidence as impeachment. There is no express ruling from the trial court under what theory it admitted the evidence but it is clear from the trial court's discussion it was impeachment.[2]

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[2] THE COURT: Wait. Hold on. Hold on. It seems to me that you asked her that, right?
THE WITNESS: I'm sorry?
THE COURT: And she's denied it, right?
MR. McKAY: She denied -- Erica denied it. We believe it's allowed under two things, one, rebuttal, a direct rebuttal; but, specifically, for the hearsay objection, which I actually read the law on this just to pop it into my brain "to render invalid a claim by declarant against another." So it's an exception to hearsay.
THE COURT: And they asked her about it. They gave her the opportunity to...
MR. MIMS: I mean, she did deny, generally, telling other people contradictory story but she didn't specifically deny speaking --
THE COURT: Well, get her back here and we're going to ask her the question. Get her back here right now.
MR. MIMS: Yes, Judge.
MR. McKAY: I think she did specifically --
THE COURT: I think she denied she ever told anybody anything like that. She denied having a boyfriend. She denied all that stuff. Get her back here and we'll put her on right this second; otherwise, she's going to testify.
(4 RR 127-128).

Rollins was never recalled and Thomas proceeded with her testimony in front of the jury.

The testimony did not operate as direct, substantive evidence of Selectman's self-defense theory because it was inadmissible under any other theory. If a witness's own out-of-court statement is offered as substantive evidence of facts at issue in trial, the statement is inadmissible unless it is excepted from the hearsay rule. *Lund v. State*, 366 S.W.3d 848, 855 (Tex. App.—Texarkana 2012, pet. ref'd). Thomas's testimony was inadmissible under any hearsay exception.[3] Consequently, it could only serve as impeachment evidence and not substantive evidence of Selectman's self-defense claim.[4]

3. The petition should be dismissed

As impeachment evidence alone, which cannot be used as primary evidence, it was limited to the purpose for which it was admitted (attacking Rollins's credibility). Thomas's testimony was not substantive evidence supporting

[3] Rollins's statement could not be used as substantive evidence under another evidence theory. The statement would have been inadmissible under Rule of Evidence 801(e)(1). . In order to qualify for exclusion under Rule 801(e)(1), the inconsistent statement must have been "given under oath subjection to the penalty of perjury at a trial, hearing, or other proceeding, …or in a deposition." TEX. R. EVID. 801(e)(1). Rollins's bathroom statement to Thomas does not qualify. Selectman's counsel at trial raised language from Rule 803(24) as a possible hearsay exception, but the exception is inapplicable. TEX. R. EVID. 803(24).

[4] No limiting instruction was needed when the evidence was admitted. When testimony can only be used by the jury for impeachment, no limiting charge is required. *Cantrell v. State*, 731 S.W.2d 84, 95 (Tex. Crim. App. 1987); *Jones v. State*, 810 S.W.2d 824, 828 (Tex. App.—Houston [14th Dist.] 1991, no pet.). "Similarly, when a defendant impeaches the *State's witness*, an instruction limiting the jury's consideration of the impeaching testimony is unnecessary." *Jones, 810 S.W.2d at 828.*

Selectman's defensive theory.[5] Thus, Selectman cannot now rely on this impeachment evidence to establish she was entitled to a self-defense instruction or a defense of third person instruction. Because there is no direct evidence to establish she was entitled to a self-defense instruction or a defense of a third person, the petition should dismissed to pursuant to Rule 69.3. TEX. R. APP. P. 69.3.

[5] Selectman's defensive theory presented during her opening statement was not self-defense or defense or third party, but Rollins's had no credibility and lied. (4 RR 112).

In the event the Court not dismiss the petition as improvidently granted, the State addresses Appellant's Grounds for Review.

APPELLANT'S FIRST GROUND:

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to support a rational jury finding that appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against a violent home intruder on April 2, 2015.

STATE'S RESPONSE:

There is no evidence appellant had a "reasonable belief" that the use of force was immediately necessary to defend herself or others from another's use or attempted use of unlawful force because there is no evidence she believed an intruder was in the home.

SUMMARY OF ARGUMENT

In her first ground of review, Selectman argues the court of appeals erred by ruling the instant record insufficient, as a matter of law, to support a rational jury finding that she reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against a violent home intruder on April 2, 2015. There is no evidence in the record to establish Appellant's subjective belief at the time of the shooting. There is no evidence Selectman herself believed an intruder was upstairs with Rollins at any point in the events leading up to the shooting. Nor

is there any evidence that established her reasonable belief that deadly force was necessary. The court of appeals correctly affirmed the denial of the jury instruction.

ARGUMENT

1. Standard of Review

A trial court must instruct the jury on the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14. Determining jury charge error is a two-step process. First, the court must determine if error exists and then second, if there is error, whether there is sufficient harm to warrant reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Appellant objected to the charge, therefore Appellant must only show "some harm." *Almanza v. State*, 686 S.W.2d 157, 160 (Tex. Crim. App. 1985).

Here, there was no error.

2. Applicable Law

A person is justified in using force against another when and to the degree she reasonably believes the forces to protect against the other's use or attempted use of unlawful force. TEX. PENAL CODE ANN. § 9.31(a).

A person is justified in using deadly force against another if she would be justified in using force, and she reasonably believes deadly force is immediately necessary to protect herself against the other's use or attempted use of unlawful deadly force. TEX. PENAL CODE ANN. § 9.32(a).

A person is justified in using force or deadly force against another to protect a third person

(1) Under the circumstances the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
(2) The actor reasonably believes his intervention is immediately necessary to protect the third person.

TEX. PENAL CODE ANN. § 9.33.

By the express terms of the statute, there must be some evidence that the defendant had a "reasonable belief" that the use of force was immediately necessary to defend herself or others from another's use or attempted use of unlawful force. Therefore, there must be some evidence in the record of the defendant's state of mind or "observable manifestations" of the defendant's state of mind at the time he used force. *See Reed v. State*, 703 S.W.2d 380, 384-85 (Tex. App.—Dallas 1986, pet. ref'd) (citing *Smith v. State*, 676 S.W.2d 584, 587 (Tex. Crim. App. 1984)); *VanBrackle v. State*, 179 S.W.3d 708, 712 (Tex. App.—Austin 2005, no pet.). Therefore, the defendant must hold a subjective believe and then that subjective belief must be reasonable. Reasonable belief means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. TEX. PENAL CODE ANN. § 1.07(a)(42).

"A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or

contradicted, and regardless of what the trial court may think about the credibility of the defense." *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001). The reviewing court reviews the evidence in the light most favorable to the defendant's requested admission.

3. There is no evidence Appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins

The lower court properly upheld the denial of the jury instruction. The evidence did not support a rational jury finding that appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against a violent home intruder on April 5. The evidence did not establish Selectman's subjective belief deadly force was necessary to protect against unlawful deadly force.

Selectman did not testify and therefore the evidence of her state of mind must come from other sources. *See Lavern v. State*, 48 S.W.3d 356, 360 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (en banc) ("While a non-testifying defendant may be entitled to a charge on self-defense, it is rare for the defense to be raised when the defendant fails to testify."). Thomas testified that Rollins told her that she had a boyfriend behind Selectman's back and on the day of the shooting, she and the boyfriend were arguing about money at Rollin's home. Selectman came home and she "instantly went upstairs to [Rollins's] defense because she didn't know what was

going on." (4 RR 129). There is no evidence that describes the nature of the argument. During a scuffle, a gun went off.[6]

On appeal, Selectman argues the person upstairs was a violent intruder and therefore reasonably believed deadly force was immediately necessary to protect herself and Rollins. There is no evidence Selectman believed an intruder was upstairs with Rollins at any point in the events leading up to the shooting. The only evidence is she went upstairs "to [Rollins's] defense" presumably because Rollins was arguing with her boyfriend. The reasonableness of an accused belief that force was immediately necessary to defend herself or another, must be viewed from the accused's standpoint. TEX. PENAL CODE ANN. § 9.31(a); *Jones v. State*, 544 S.W.2d 139, 142 (Tex. Crim. App. 1976). Thomas testified that Selectman did not know what was going on. While the record does support that Rollins claimed to hospital officials that an intruder in the home that shot her, Selectman cannot use that evidence to bolster her claim. The standard is not if the evidence could have given the defendant a reasonable belief; but rather, is there some evidence that the defendant held a reasonable belief deadly force was necessary to protect against

[6] [Rollins] didn't really stat [sic] if Nicole had a gun or if he had a gun she just said that he -- she came up -- Nicole came upstairs and started scuffling with the boyfriend and in the midst of that the gun went off. (4 RR 130).

unlawful force.[7] The evidence did not show how Selectman perceived the events as she ascended the stairs and once she confronted the scene upstairs as described by Thomas. Specifically, once upstairs there is no evidence why Selectman believed she needed to use deadly force against the other person. Thomas described a scuffle, but there is no evidence for the jury to infer the immediate use of deadly force was necessary.[8]

The lower court correctly concluded the evidence was insufficient to permit a jury to rationally infer Selectman reasonably believed the immediate use of deadly force was necessary to protect herself or Rollins because there was no evidence of Selectman's belief.

[7] As would be applicable to Selectman's intruder argument, the person's belief that the force was immediately necessary is presumed reasonable if: 1) she knew that the other person unlawfully and with force entered, or was attempting to enter unlawfully, 2) she did not provoke the other person, and 3) she was not otherwise engaged in criminal activity. TEX. PENAL CODE ANN. § 9.31(a). There is no evidence Selectman knew another person entered the residence unlawfully entered with force.

[8] There is evidence that Rollins was threatened by her boyfriend that if she did not testify against Selectman, he would kill her. (4 RR 130). However, this threat occurred some point after the shooting. There is no evidence the boyfriend was threatening her with unlawful deadly force. There was an argument about money. An instruction that would have allowed the jury to infer Selectman held a subjective belief that deadly force was necessary to resolve an argument about money and that belief was reasonable is irreconcilable with Chapter 9 of the Penal Code.

APPELLANT'S SECOND GROUND:

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the confession and avoidance doctrine because: (1) appellant never flatly denied an essential element of the offense charged; and (2) the record contains more than ample evidence from which the jury could rationally find that appellant either did fire, or otherwise cause the shot that injured the complainant.

STATE'S RESPONSE:

The confession and avoidance doctrine is not satisfied by merely establishing a situation in which the appellant could have acted in self-defense.

SUMMARY OF THE ARGUMENT

The lower court found that Selectman did not admit to her otherwise illegal conduct. Selectman is correct, the confession and avoidance doctrine does not require a defendant to admit to all elements of the charged offense, including the manner and means. Under Selectman's rationale, the confession and avoidance doctrine merely requires a defendant to be an observer of events in a situation which *could* permit self-defense. Such a rule which lead to illogical verdicts. Selectman admits no conduct, and casts herself as a passive observer of events during which a gun goes off. This does not satisfy the confession and avoidance doctrine. Nevertheless, resolution of whether the lower court correctly applied the doctrine is unnecessary. The lower court correctly denied the instructions because Appellant never established she held a "reasonable belief" deadly force was necessary.

ARGUMENT

The lower court's opinion found the evidence insufficient to permit a jury to rationally infer "that Selectman shot the gun and admitted to her otherwise illegal conduct." Selectman v. State, 04-118-00553-CR, 2020 WL 1442645, *3 (Tex. App.—San Antonio, Mar. 25, 2020).

1. Relevant Law

Recently, the Court reaffirmed the confession and avoidance doctrine to the application of self-defense. Selectman relies heavily on this Court's holding in *Ebikam v. State*, PD-1199-18, 2020 WL 3067581 (Tex. Crim. App. June 10, 2020).[9] In *Ebikam*, the State charged the defendant with assault by hitting the victim in the face with his hands. *Id*. at *1. The defendant admitted to pushing a door closed to keep the complainant out of his home, he did not intent to hurt her. *Id*. The majority of the Court ultimately found the defendant does not need to admit to the manner and means as alleged in order to meet the requirements of confession and avoidance. *Id*. at *4. The Court reasoned:

> A flat denial of the conduct in question will foreclose an instruction of a justification defense…But an inconsistent or implicit concession of the conduct will meet the requirement. Consequently, although one cannot justify an offense that he insists he did not commit, he may equivocate on whether he committed the conduct in question and still get a justification instruction.

Id. at *3.

[9] *Ebikam* was released after the lower court's opinion.

While still called the confession and avoidance doctrine, it is apparent no confession is needed at all to sustain a self-defense jury instruction. However, *Ebikam* still requires some concession of the conduct; even if implicit, inconsistent or equivocal.[10] *Id*.

2. Appellant did not satisfy the confession and avoidance doctrine

Selectman now wants this Court to hold as long as a defendant does not foreclose self-defense (flatly deny the conduct), the defendant need not even make an inconsistent or implicit concession of the conduct. This is not a logical extension of *Ebikam* or the doctrine as articulated by the Court. Such an application leaves a trial court guessing when to instruct the jury. Such an application leaves a jury speculatively filling in blanks regarding the defendant's conduct.

A defendant can equivocate on whether he committed the conduct in question, but Selectman offers no evidence of what her conduct actually was that morning. Had she cast herself in a role fighting for control of the gun in the boyfriend's hand, or the boyfriend threatened her or Rollins with force (deadly or otherwise) and had to defend herself and Rollins, she would undoubtedly be entitled to a justification instruction. Had she claimed, or the evidence established, she fired the weapon in an accidental panic, her argument that confession and avoidance doctrine was

[10] Conduct as defined mean an act or omission and its accompanying mental states. TEX. PENAL CODE § 1.07(a)(10).

satisfied would have some merit. She would not have flatly deny the conduct, but would have admitted to some conduct, even though no culpable mental state. Such an explanation would be buttressed by the fact Selectman shot the person she was trying to protect and not Rollins's boyfriend. However, the evidence does not support this. Selectman's purported self-defense evidence describes her as a passive player. Rollins was in an argument with her boyfriend, Selectman ran upstairs, there was a tussle in which it is not clear if she was involved, and a gun went off. She merely established her presence and an injured complainant. A judge or juror could imagine a scenario which might lead to Selectman to act in self-defense, but speculation is not the confession and avoidance standard. The defendant must point to some conduct of his or her own in the record; even if unbelievable. Selectman did not.

3. *Nevertheless, the lower court's application is unnecessary because the evidence did not sufficiently raise a self-defense claim or defense of a third person claim*

Ultimately, the lower court's application of the confession and avoidance doctrine is not an issue. Selectman correctly points out she never flatly denied the conduct in question to foreclose a self-defense instruction and the record contains some evidence that she did fire the gun that injured the complainant.[11] But the issue

[11] Rollins testified Selectman shot her.

surrounding the denial of the self-defense instruction is not whether Selectman flatly denied the conduct or that she fired the gun but whether the evidence raised the issue of self-defense at all. Specifically did the evidence establish that Selectman reasonably believed the use of deadly force was necessary to protect herself or Rollins. As discussed, it did not.

Contrary to Selectman's position, there is no evidence she believed the person arguing with Rollins was a violent home intruder. There was no evidence that Selectman fired the gun to protect Rollins or herself. The only evidence was there was a scuffle and a gun went off. There is no evidence that the scuffle was over the gun.

APPELLANT'S GROUND THREE:

The intermediate appellate court substituted its own harm analysis for actual findings of fact by a properly instructed jury.

STATE'S RESPONSE:

Appellant was not harmed by the lack of the instruction.

SUMMARY OF THE ARGUMENT

While the lower court did not conduct a rigorous harm analysis, it correctly concluded Selectman was not harmed. Viewing the record as a whole, there was never an attempt to establish a defensive theory around self-defense or defense of a third person, but rather to wholly discredit Rollins and cast blame on the mysterious man named Mac.

ARGUMENT

1. Relevant Law

"Some harm" means actual harm and note merely theoretical harm. *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013). Actual harm is established when the erroneous jury instruction affected "the very basis of the case," "deprive[d] the defendant of a valuable right," or "vitally affect[ed] a defensive theory." *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011) (citing Almanza, 686 S.W.2d at 171. To assess harm, we must evaluate the whole record, including the jury

charge, contested issues, weight of the probative evidence, arguments of counsel, and other relevant information. *See Cornet*, 417 S.W.3d at 450; *Almanza*, 686 S.W.2d at 171.

2. The lower court properly concluded Appellant was not harmed

Selectman argues the lower court "effectively substituted its own harm analysis for findings of fact by a properly instructed jury." It is unclear what findings of fact Selectman references, but the lower court's conclusion Selectman was not harmed was proper.

The Jury Charge

The lower court correctly reasoned the charge instructed the jury on the mental states for aggravated assault: intentionally, knowingly, and reckless. The lower court reasoned that because Selectman argued during closing argument that if she shot Rollins, it was during a scuffle, and if the jury believed this explanation it would have negated the required mental states. However, this was not argued by Selectman, nor the State. Regardless, the jury charge did not instruct the jury on self-defense or defense of third person. Without the instruction, the jury was never altered it could consider the justification defense. This factor weighs in favor of finding some harm.

State of Evidence

The contested issue at trial was whether or not Selectman shot Rollins. Rollins testimony established two stories: that Selectman shot her and that an intruder shot her. Rollins denied she had a boyfriend at the time, but the evidence established she introduced a man named Mac to others as her fiancé or boyfriend (4 RR 64, 204). The implication of the testimony from these witnesses was Rollins was a prostitute and Mac was her pimp. Rollins told Thomas in 2017 that on the day of the shooting, she was arguing with her boyfriend about money upstairs when Selectman came home. (4 RR 129). Thomas testified that because Rollins was afraid of this man, she lied and said Selectman shot her. (4 RR 130).

The jury is the sole judge of the witness's credibility and the weight to be given to their testimony. *Brooks v. State*, 323 S.W.3d 863, 899 (Tex. Crim. App. 2010). Rollins testified that she made up the intruder story in the hospital because Selectman was in the room when first asked. She denied knowing someone named Mac. Rollins's neighbor was outside during the shooting timeframe and only saw Selectman come and go. He never saw Rollins or a man. The photographs admitted into evidence do not establish who shot Rollins, but corroborate her version of events. She was shot and fled to the bathroom. The photographs show blood inside and outside the restroom. The verdict implies it found Rollins credible. This does not weigh in favor of finding harm.

Arguments of Counsel and Other Relevant Information

Counsel's arguments confirm the contested issue at trial was whether or not Selectman shot Rollins, not that she was shot while trying to defend herself or Rollins from an intruder. Selectman opened her defense as follows:

> One of the very first things that Judge Angelini said is both sides get an opportunity to present things but the defense does not have to present anything. However, we're going to today, and I'm going to tell what you we're going to show you. Also, Mr. Mims indicated that they don't have to prove a motive, but what we're going to do is through the evidence today we're going to show you a motive but the motive is why Erica Rollins got up here and lied to try and convict Nicole Selectman, her ex-girlfriend.

[continued]

> She's going to tell you that Erica Rollins followed her into the bathroom and was very tearful. [sic] She's going to tell you a detailed story about what Erica told her and the fact that she's been lying all of this time because she's afraid of Mac. She's going to also tell you that Mac is still stalking Erica right now in Atlanta. But what is important about this is she's going to tell you that she had the conversation with Erica and Erica specifically laid out every single thing that was said the very first time Erica went to the hospital at Northeast Methodist. That somebody came in, not by name, it says "intruder" but somebody came in and that Nicole and Erica were both getting threatened. There was a struggle that ensued and as a result Erica ended up getting shot.
>
> This is proof of motive for Erica lying. Plain and simple.

[continued]

> So those are the three folks that we're going to show you and what we expect the evidence is going to prove and show you that we can prove the motive but the motive is not one for Nicole. The motive is one for Erica for her lying because she's still scared about Mac.

(4 RR 112-115, 117).

The lower court correctly noted that statement was vague as to whether Selectman's theory of the case was whether Selectman or Rollins's boyfriend, Mac, shot the gun. This is inconsequential. Selectman never mentioned elf-defense or defense of third person. Under Selectman's theory, Rollins was still afraid of her ex-boyfriend and therefore lied and said Selectman shot her. That theory was advanced in closing argument when Selectman's argued: "the thing that absolutely killed [Rollins's] story was the fact she said 'Nicole saved me.'…That is exactly the truth. Nicole saved her from Mac." (5 RR 24). The overall argument pounded Rollins. Defense counsel either called her a liar or accused her of lying over 25 times. One example:

> She's not credible, and don't let her stare you down or scare you or any of that stuff. The fact of the matter is I have no problems looking at her and calling her a liar.

(5 RR 29).

Self-defense is a justification defense. TEX. PENAL CODE ANN. § 9.02. If the evidence wholly fails to establish the need for the justification to use unlawful force, the defense cannot be foreclosed. A defendant can have competing defensive theories. However, the self-defense theory was never presented; not because it was foreclosed from lack of an instruction, but because self-defense or defense of third person was never a theory presented or supported by the evidence.

The record establishes an ongoing attempt to discredit the complainant. In the defense's words she was a prostitute with a pimp, and a liar. Given the theory of Selectman's case from the outset, the arguments of counsel, and the record as a whole, the lower court's finding Selectman was not harmed by the trial court's failure to instruct the jury was correct.

PRAYER FOR RELIEF

Counsel for the State prays that this Honorable Court AFFIRM the court of appeals.

Respectfully submitted,
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/s/ Laura E. Durbin

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Laura E. Durbin, hereby certify that the total number of words in this brief is 5,502. I also certify that a true and correct copy of this brief was emailed to Dean Diachin, at Dean.Diachin@bexar.org, counsel for Nicole Selectman, and to Stacey Soule, State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov, on this the 11th day of February, 2021.

/s/Laura E. Durbin

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